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Supreme Court, U.S.
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No. 87-1648

In The

Supreme Court of the United States

October Term, 1988

Reginald Poole,
Petitioner

v.

United States of America,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

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Questions Presented

1. Whether a Public Defender, without her client's knowledge or consent, has the authority to "stipulate to" an element of a criminal offense prior to trial, thereby waiving a panoply of the defendant's Fifth and Sixth Amendment Rights.

2. Whether the trial judge may eliminate the government's burden of proving elements of a criminal offense charged in the indictment by instructing the jury to disregard those elements, even with the implied consent of the Public Defender, under the Fifth Amendment's Due Process and Grand Jury clauses.

3. Whether a defendant's Sixth Amendment Right to Counsel is satisfied by the physical presence at sentencing of a lawyer who is neither appointed nor retained so that no attorney-client

relationship exists.

4. Whether a habeas corpus petitioner is entitled to an evidentiary hearing to determine whether the Public Defender's prejudicial refusal to challenge obvious trial and sentencing errors was negligent or strategic and whether an alleged off-record waiver actually occurred.

TABLE OF CONTENTS

Page

Questions Presented.....i

Table of Contents.....ii

Table of Authorities.....iii

Argument.....2

I. A Stipulation To An Element Of The Offense Should Be Declared "Fundamental," Requiring The Defendant's Informed Consent, When, As The Government Argues, It Necessarily Leads To A Burden-Eliminating Jury Instruction.....2

II. As The Government Concedes, A Defendant Is Entitled By The Sixth Amendment To Some Attorney-Client Relationship, But Petitioner Was Not Represented By Appointed Or Retained Counsel At Sentencing In This Case.....6

III. The "Impermissible Appellate Fact-Finding" By The Court Of Appeals In This Case Requires A Remand For Reconsideration In Light Of Amadeo v. Zant, 108 S.Ct. 1771.....8

Conclusion.....12

Table of Authorities

Cases — Page

Amadeo v. Zant, 108 S.Ct. 1771...8, 9, 11

McCoy v. Court of Appeals of Wisconsin, 108 S.Ct. 1895, at 1901.....7

Rose v. Clark, 106 S.Ct. 3101, 3106, 3107, fn. 8.....4

Sanders v. United States, 373 U.S. 1....3

Satterwhite v. Texas, 108 S.Ct. 1792 (1988).....6

United States v. Ellison, 798 F.2d 1102, 1106 (7th Cir.), cert.den. 107 S.Ct. 893 (1987).....11

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In response to this Court's Order, the United States has submitted its "Brief For The United States In Opposition." The belatedly filed Brief in Opposition is based substantially upon unsupported speculation. The government's brief is helpful, however, because through its concessions, and

implicitly through its argument, the government demonstrates (i) the importance of the questions presented in this petition for certiorari; (ii) the unsettled nature of the law surrounding those issues; and (iii) that this case presents an appropriate vehicle for resolving the questions.

Argument

I. A Stipulation To An Element Of The Offense Should Be Declared "Fundamental," Requiring The Defendant's Informed Consent, When, As The Government Argues, It Necessarily Leads To A Burden-Eliminating Jury Instruction.

The government effectively concedes that the "attorney control" question -- what constitutional rights may a defense attorney waive without the informed consent of the defendant -- has bedeviled the lower courts, has not been authoritatively resolved by this Court, and is squarely presented by the Court of

Appeals' decision in this case.[1] (Brief in Opp. 7-8).

The question presented is not whether a decision to stipulate to, thereby eliminating, an element of the offense is "tactical" or "wise," but who in our constitutional system has the ultimate authority to make such a decision. That is particularly true when, as here, the stipulation becomes intertwined with a subsequent "burden-eliminating" jury instruction. This Court should declare

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[1]. The govcrnment suggests that Sanders v. United States, 373 U.S. 1, creates a procedural bar to the consideration of this issue in a 2255 proceeding, since the issue was raised on direct appeal and constructively decided by the Court of Appeals' original affirmance without any opinion. To the contrary, however, this Court in Sanders held that, although a lower court may decline to reconsider issues already decided on direct appeal, res judicata does not apply in 2255 proceedings. The Court of appeals, by virtue of its opinion below in this case, obviously exercised its discretion to consider and decide the issue for the first time on the merits; petitioner seeks review of the Court of Appeals' decision, which is appropriately before this Court.

that the "guiding hand" of the attorney, in other words, cannot become an "iron fist," as occurred in this case.

The importance of the alleged pre-trial stipulation must be evaluated together with the subsequent burden-eliminating jury instruction to determine whether the "fully informed and publicly acknowledged consent" (Brief in Opp. 7) of the defendant should be required. If, as the government argues, once a particular stipulation is entered into, the trial court is correct when it later instructs the jury to ignore three elements of the criminal offense, as happened in this case (Pet. App. E), eliminating the government's burden of proof on those elements in conflict with the Due Process Clause, Rose v. Clark, 106 S.Ct. 3101, 3106, 3107, fn. 8, then the earlier stipulation "phase" of the case must be viewed as fundamental.

The importance of a resolution by

this Court of this continuing trial practice question -- whether a defendant must consent personally to a stipulation to an element of the offense which later forms the basis of a burden-eliminating jury instruction -- cannot be overstated.[2]

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[2]. The government mistakenly suggests that a stipulation to federal insurance was created during trial (Brief in Opp. 3) and that, since a defense attorney should have "full authority to manage the conduct of the trial" (Brief in Opp. 7), the alleged stipulation in this case did not require defendant's consent.

To the contrary, however, there is no trial stipulation -- agreement between the parties -- contained in the record: no oral agreement and no written agreement. During oral argument before the Court of Appeals (on direct appeal, Eleventh Circuit No. 85-8058), the prosecutor purported to overcome the record deficiency by informing the Court that the agreement had occurred during a telephone conversation with the public defender several days prior to trial. While Poole seeks an opportunity to demonstrate that the prosecutor misinterpreted or misrepresented that pre-trial conversation, nevertheless not even the prosecutor claimed that "attorney control" was required in this case by trial exigencies.

II. As The Government Concedes, A Defendant Is Entitled By The Sixth Amendment To Some Attorney-Client Relationship, But Petitioner Was Not Represented By Appointed Or Retained Counsel At Sentencing In This Case.

The government concedes that Poole literally had no appointed or retained counsel during the entirety of the sentencing proceeding (Brief in Opp. 4, 10).

In Satterwhite v. Texas, 108 S.Ct. 1792 (1988), this Court has just reaffirmed that "some constitutional violations . . . by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Sixth Amendment violations that pervade the entire proceeding fall within this category," id. at 1797. Although the government argues that the public defender nevertheless "continued her attorney-client relationship with petitioner" during sentencing, (Brief in

Opp. 11), the government does not explain the basis of such "relationship." By fudging the issue, respondent underscores the importance of question three presented by this petition: Whether the Sixth Amendment entitles a criminal defendant to at least some attorney-client relationship created by appointment or private contract, such that the rules of attorney-client privilege and loyalty apply.

Certainly, this Court's dicta in McCoy v. Court of Appeals of Wisconsin, 108 S.Ct. 1895, at 1901, discussing the importance of the filing of a "Motion to Withdraw" by appointed counsel, would be irrelevant if an attorney could continue her attorney-client "relationship" after the Motion to Withdraw had been formally granted (as in this case). Thus this case, as underscored by the government's argument, is an appropriate vehicle for this Court to determine the minimum

formal requirements for representation by counsel in a criminal case.

III. The "Impermissible Appellate Fact-Finding" By The Court Of Appeals In This Case Requires A Remand For Reconsideration In Light Of Amadeo v. Zant, 108 S.Ct. 1771.

The government speculates throughout its Brief in Opposition (pp. 4, 5, 10, 11) that the public defender "believed" she was still Poole's attorney at sentencing, the judge "had apparently forgotten" that he had formally terminated her appointment, and that "the district court's act of signing the termination order had absolutely no effect on petitioner's right to the effective representation of counsel" at sentencing (Brief in Opp. 11).

These speculations, although based upon the opinion below, border on the bizarre. It is common practice throughout the federal Court system for copies of court orders to be mailed

promptly to counsel of record. If any speculation is warranted in this case, therefore, without the requested evidentiary hearing, we should assume that the public defender had received notice and was aware of the fact she no longer represented Poole at sentencing. We should also assume that the experienced trial judge and his court clerk were fully aware, at such an important event as a felony sentencing, that Poole no longer had a lawyer.

As a recent unanimous decision by this Court acknowledges, the Eleventh Circuit is prone to engaging in "impermissible appellate fact-finding" in habeas corpus cases, Amadeo v. Zant, 108 S.Ct. 1771, 1780 (1988). Whereas in Amadeo the Eleventh Circuit declined to defer to fact-findings following an evidentiary hearing in a manner which this Court found "difficult to fathom," id. at 1779, in the present case the

Eleventh Circuit, without any evidentiary hearing at all, engaged in more egregious "appellate fact-finding" -- rank speculation.

The Court below "found" that (i) the public defender did agree to enter into a stipulation with the prosecutor, notwithstanding petitioner's affidavit to the contrary; (ii) the public defender's refusal to take six specific actions at trial as requested by the defendant -- each having a plausible factual and legal basis -- was the result of "reasonable, tactical" decision-making, rather than a refusal to investigate or otherwise "rock the boat"; (iii) the public defender's failures to challenge an illegal restitution order and to seek correction of an erroneous presentence report (after the defendant personally challenged the report) were "reasonable, tactical" decisions, rather than simple negligence; and (iv) the public defender did not

know, and the judge forgot, that the Court had formally terminated the public defender's appointment to represent petitioner several weeks prior to sentencing.

At the very least, this Court should remand this case, on the basis of question four presented in this petition, to the court of appeals for reconsideration in light of Amadeo v. Zant, supra. It bears repeating that the improper denial of an evidentiary hearing was the first issue raised on appeal to the court below.[3]

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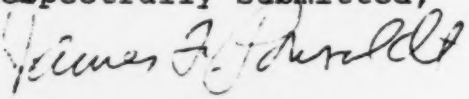
[3]. In United States v. Ellison, 798 F.2d 1102, 1106 (7th Cir.), cert. den. 107 S.Ct. 893 (1987), the Court of Appeals held that a conflict of interest for Sixth Amendment purposes existed where the facts showed that defense counsel advised the defendant to plead guilty to avoid "making waves" with federal prosecutors with whom Counsel would be working in the future. This is among the questions -- the public defender's motives -- that an evidentiary hearing would explore in this case.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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